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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 647

GICHNER IRON WORKS, INC., *Petitioner*

v.

HELEN HANNA AND CICERO HANNA, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RICHARD W. GALIHER
WILLIAM E. STEWART, JR.
820 Woodward Building
Washington, D. C.
Attorneys for Petitioner

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The Petitioner Gichner Iron Works, Inc., a corporation doing business in the District of Columbia, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in Number 13,950 reversing the judgment of the United States District Court for the District of Columbia. Alternatively, it prays that this Court remand this cause to the United States Court of Appeals for the District of Columbia Circuit directing that Court to rehear this case *en banc*.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 2, 1958. The petition for rehearing *en banc* was denied on November 5, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

THE QUESTION PRESENTED

Should the Supreme Court of the United States grant certiorari when a decision of the United States Court of Appeals for the District of Columbia Circuit does not reflect a decision by the full bench or even a majority of the judges of that Court in two separate appeals of this case, or alternatively, should the Supreme Court of the United States remand the cause back to that Court, directing it to rehear the case *en banc*?

STATEMENT OF THE CASE

Helen Hanna, a tenant of Annie C. Fletcher, was injured on May 2, 1949, when a cast iron railing attached to cast iron steps allegedly gave way in the front of the house where she resided, and precipitated her into an areaway below the steps. The railing in question had been repaired during the year 1942 by the petitioner, Gichner Iron Works, Inc., at the request of the landlord, Fletcher. The repairs were accomplished and accepted by the landlord. Seven years later, the railing gave way, allegedly at the situs of the repairs.

On December 28, 1950, Helen Hanna and her husband instituted a suit for damages against Fletcher

and the petitioner to recover for Helen Hanna's injuries. The Hannas alleged that the petitioner had negligently repaired the steps and railing and that as a result of the alleged negligence, Helen Hanna was injured.

On November 16, 1953, the case came to trial in the United States District Court for the District of Columbia, Judge Walter Bastian, presiding. On November 17, 1953, Judge Bastian directed a verdict for both the landlord and the petitioner on the plaintiff's opening statement ruling that the statute of limitations had run as to the claim and, further, that the decision of *Ford* v. *Sturgis*, 56 App. D. C. 361, 14 F. 2d 253, barred Helen Hanna from prosecuting a claim against the petitioner, since the repairs were accepted by the landlord and a third person not in privity with the contractor could not recover against the petitioner. He further ruled that the respondents had failed to state a cause of action against either defendant.

Thereafter, respondent appealed to the United States Court of Appeals for the District of Columbia Circuit. On January 6, 1955, the case was argued before a three-judge panel, consisting of Judges Henry Edgerton, David Bazelon and John A. Danaher. On March 2, 1955, the full bench, Judges Bastian and Washington not participating, ordered a rehearing before the full bench. The case was argued on April 1, 1955. Before the case was reargued, Chief Judge Harold Stephens of that Court died. The Honorable Warren Burger was appointed by the President to fill the vacancy created by Judge Stephens' death in June of 1955. He was appointed again on January 12, 1956 and confirmed by the Senate on March 28, 1956. Judge Bastian of that Court who was the trial judge in the

District Court, was precluded by statute, from participating in the case. The Court in a 4 to 3 opinion reversed as to both Fletcher and the petitioner. A petition for rehearing was filed by both Fletcher and petitioner, but rehearing was denied on February 17, 1956. Petitioner then petitioned this Court for a writ of certiorari. Certiorari was denied. *Gichner Iron Works, Inc.* v. *Hanna,* 76 S. Ct. 1051; 351 U.S. 981; 100 L. Ed. 1501.

Thereafter, the case was retried in the United States District Court for the District of Columbia, Judge F. Dickinson Letts presiding. At the conclusion of respondent's testimony, Judge Letts found that no prima facie case had been made out and directed a verdict, in favor of petitioner and Fletcher. The case was again appealed by respondent.

After the second appeal was noted, the petitioner and Fletcher filed a motion in the Court below for an *en banc* hearing. The motion referred to the history of the case and pointed out that because of the practice of the Court below to dispose of cases by division, this case could very well come before a panel of the judges who participated in the majority or minority opinions in the first appeal. A *per curiam* order denied petitioner's motion for an *en banc* hearing on February 26, 1958. Two judges of the original majority panel and one of the minority composed the division which heard the second appeal. This cause then came on for hearing before a panel of the Court below, consisting of Chief Judge Edgerton, and Judges Bazelon and Danaher. On October 2, 1958, that panel rendered its decision and in a 2 to 1 opinion, reversed the lower Court and remanded the case for a new trial. The majority opinion was rendered by two of the four

judges who concurred in the majority opinion in the original appeal of this case. A dissent was filed by Judge Danaher, one of the original dissenting panel.

On October 17, 1958, the petitioner petitioned the Court below for a rehearing *en banc*. One reason urged in the petition for a rehearing *en banc* was the most unusual history of this case in the Courts below. On November 5, 1958, the Court below in a per curiam order denied petitioner's request for a rehearing *en banc*. In the order, Circuit Judge Wilbur K. Miller voted for granting the petition for rehearing, and Judge Bastian announced that he would not vote in favor of the rehearing *en banc* because he believed that he was disqualified, having sat as a District Judge on the original case, which was reversed by the Court below. Judge Bastian stated, however, that he would otherwise vote for the rehearing *en banc* and that the 4-3 decision in the first appeal, should be reviewed and reversed as soon as another case arose involving the same point.

REASONS FOR GRANTING THE WRIT OR TO REMAND TO THE COURT BELOW

1. The Opinion in the Second Appeal of This Case Still Does Not Reflect a Decision by the Full Bench or Even a Majority of the Judges of the United States Court of Appeals for the District of Columbia Circuit. Therefore, the Law on a Case of This Kind is in a State of Uncertainty in the District of Columbia.

The history of this case through its course in the courts of the District of Columbia coupled with the unusual nature of the negligence charged to petitioner, is such that this Court should remand this case to the Court below, or, direct that Court to order a rehearing *en banc* or should grant this petition for certiorari.

The observation of Judge Walter Bastian contained in the Order, dated November 5, 1958, in the Court below, denying a rehearing *en banc*, graphically illustrates the injustice that could result to the petitioner in this case if it went to trial before a jury. As Judge Bastian points out, if a similar case went before the full Bench of the Court below, it would seem likely that *Hanna* v. *Fletcher*, 97 U.S. App. D.C. 310, 231 F. 2d 469, could be reversed (the first appeal of this case). If there is a reasonable probability for reversal of *Hanna, supra*, we submit that it would be grossly unjust to permit this case to be retried until and unless the full Bench of the Court below passes upon the record in the second appeal of this case and reconsiders *Hanna, supra*. If respondent was successful in obtaining a verdict against petitioner, and subsequent thereto, a similar case was reversed by the Court below, the injustice that could result to the petitioner would be apparent.

The time to settle the law of the case is not after a further trial in the District Court, but while this case is on appeal. It will, thus, eliminate from the congested trial docket, a long and involved law suit and will enable this Court or the District of Columbia Circuit to settle a principle of law which is in doubt. Of the present Bench, only Judge Warren Burger has had no connection with this case. On the basis of two appeals, those judges who are presently on that Bench, except for Judge Burger, are divided four-four.

A further consideration is urged: A retrial of this case will be protracted. It is evident that this will result in great additional expense to the petitioner. If one aim of the administration of justice is to give parties a hearing at a minimum of cost, then we submit

that this is another valid reason for this Court either to grant the Writ or remand this case to the Court below for a rehearing *en banc*.

Equally important as the history of this case in the Court below is the unusual charge of negligence in this case. The opinion in *Hanna, supra*, and in the second appeal, show that in essence, the negligence charged is that petitioner failed to prevent rust after the completion of minor repairs on an old set of cast iron steps that had been in existence for over fifty years before this unfortunate accident. The majority opinion in the second appeal states that a failure to prevent rust may be the basis for negligence (seven years after the repairs were made). And further, that no expert testimony is needed to prove that it was negligent to make repairs in such a manner that rusting would result. Additionally, the majority, in reaching its decision, erroneously overlooked the fact that the same railing had failed in 1947, two years before the accident in question, and five years after the petitioner made repairs, and was subsequently repaired in some unknown manner by some unknown person. The dissenting opinion of Judge Danaher in the second appeal, vividly illustrates petitioner's position, needs no elaboration thereon, and demonstrates the need for action by this Court.

The petitioner urges this Honorable Court to exercise its plenary jurisdictional and discretionary powers over the Court below and either grant the Writ prayed for or, alternatively, direct the Court below to rehear this case *en banc*.

CONCLUSION

The second appeal of this cause still does not represent a majority of the judges of the United States Court of Appeals for the District of Columbia Circuit. The history of this case in the Court of Appeals demonstrates that the law in the District of Columbia is presently in a state of virtual uncertainty in a negligence case of this kind. The petitioner, Gichner Iron Works, Inc., should, therefore, not have to defend itself a third time unless, and until, the full bench of the Court below passes upon the record of the second appeal and in connection therewith reconsiders *Hanna, supra.* Justice dictates that this case should be reviewed by the Court below or the United States Supreme Court before the Court below can reconsider and possibly reverse *Hanna, supra,* in a subsequent action of the same kind.

Respectfully submitted,

RICHARD W. GALIHER
WILLIAM E. STEWART, JR.
820 Woodward Building
Washington, D. C.
STerling 3-5486

Attorneys for Petitioner